

*IMO James Galbo, Police Lieutenant (PM2601D),  
Saddle Brook*  
DOP Docket No. 2004-380  
**(Merit System Board, decided January 7, 2004)**

James Galbo, represented by Joseph Murphy, Esq., contends that James Martinelli had knowledge of test content prior to taking the examination for Police Lieutenant (PM2601D), Saddle Brook.

By way of background, the subject examination, which consisted of 75 multiple choice questions, was administered on October 22, 2002 to four individuals, James Galbo, Richard Lasiw, Raymond Tomczyk and Glenn Verost. It is noted that Messrs. Lasiw and Verost failed the exam while appellant and Mr. Tomczyk passed with final averages of 82.410 and 77.440, respectively. Subsequently, on February 5, 2003, a make-up exam was administered to Mr. Martinelli who passed with a final average of 83.320. On April 7, 2003, a certification (Certification No. PL030518) was issued on which Mr. Martinelli was ranked first, Mr. Galbo ranked second and Mr. Tomczyk ranked third. It is noted that Mr. Galbo responded to the certification by letter dated April 12, 2003. It is also noted that certification activity has been stayed pending resolution of this matter.

The written portion of the promotional examination for Police Captain (PM3537D), Saddle Brook was administered on October 22, 2002 to two individuals, Vincent Laurentino and Glenn Toepert. It is noted that some of the items from the Police Captain exam appeared on the Police Lieutenant exam. The Division of Selection Services determined that this did not pose a security risk since different titles and thus, different pools of candidates, were involved. It is also noted that on January 21, 2003, Mr. Laurentino was appointed to the Police Captain title based on a previous exam (PM3547B).

On appeal, appellant contends that Messrs. Tomczyk and Laurentino typed exam questions and answers into a computer, which was accessible to all officers, at Saddle Brook Police Department headquarters. He also contends that after the questions and answers were entered into the computer, they were printed and distributed, in part by Mr. Tomczyk, to all officers. He asserts that Mr. Tomczyk violated *N.J.A.C. 4A:4-2.10(a)-(b)* "which subjects him to disqualification from the examination and promotion there from per *N.J.A.C. 4A:4-2.10(c)*." He presents that at a hearing he "will be able to demonstrate with a computer forensic expert that Martinelli indeed did actually access the Q&A from the computer at police headquarters prior to the examination." He further claims that he orally informed the Department of Personnel that "anyone who took the make up had access to the content of the examinations and that it was common knowledge that the exam [questions and answers were] [k]nown throughout the [Police] Department at

Saddle Brook.” He argues that since the DOP was informed that exam questions and answers were available and circulated prior to the make-up exam, exam security was breached and the make-up exam “should be voided as they were voided in the Supreme Court case of [*In the Matter of Police Sergeant (PM3776V), City of Paterson*, 176 N.J. 49 (2003)].” He also argues that make-up exams which use the identical questions from the original exam are unconstitutional *per se*. He contends that “a comparison of the grades of those who [take] such identical [make-up exams] [throughout] the [S]tate of New Jersey will show a statistically impossible success rate and scores for those who take makeup exams and will conclusively prove that the use of such exams result in massive cheating by police officer[s] . . .” In support of his appeal, he has submitted documentation, including a copy of the questions and answers purportedly distributed in Saddle Brook, affidavits from John Tritto, Glenn Toepert and Anthony Maneri, and a transcript of a telephone conversation on August 21, 2003, with Thomas Sabat, a Police Sergeant in Elmwood Park.

With respect to the copy of exam questions and answers, a review finds that it contains what appears to be the document author’s recollection of 36 items from the Police Captain exam and his responses to those items.

With respect to the transcript, in his affidavit dated September 12, 2003, Mr. Galbo presents that he and Mr. Sabat “spoke of me being beaten on the Lieutenants exam by a make up candidate (Sgt. Martinelli).” A review finds that Mr. Martinelli’s name is not mentioned and it does not clearly demonstrate that Mr. Martinelli is the subject of the conversation.

Mr. Tritto, a Police Officer with the Township, presents in his affidavit that he observed Messrs. Laurentino and Tomczyk in the radio room where they discussed exam questions and answers. He contends that Mr. Laurentino was writing on a computer-printed document which he believes contained several exam questions and answers. Mr. Maneri, a Police Officer with the Township, maintains that after the test administration date, he observed Mr. Galbo removing papers from a mailbox and stating that the questions and answers to the subject exam were in his and other officers’ mailboxes. Mr. Toepert, a Police Lieutenant in the Township, indicates that he acts as computer administrator for the Township Police Department. He asserts that sometime after the exam administration date, Mr. Galbo informed him that he observed exam questions and answers on the front desk room computer and showed Mr. Toepert a copy of a document that contained what appeared to be questions and answers from the exam. Messrs. Tritto, Maneri and Toepert contend that that some officers became angry that exam questions and answers were distributed at headquarters since Mr. Martinelli had not yet taken a make-up exam. They also contend that Mr. Martinelli, “although deployed with the U.S. Navy Reserve in Lakewood, NJ, did, on occasion stop in at Saddle Brook Police Headquarters on his days off.”

In reply, Mr. Martinelli, represented by Albert Wunsch, III, Esq., has submitted affidavits from Messrs. Lasiw, Verost and Glenn Toepert. Mr. Martinelli presents in his affidavit that upon receiving his test results on February 20, 2003, he tried to contact Mr. Galbo but he spoke with Mr. Galbo's wife and informed her of the results. He argues that Mr. Galbo "has made numerous allegations that are blatantly not true. One of the allegations is that one of my co-workers gave me many of the questions that appeared on the subject test. [Mr. Galbo] claims to have a list of test questions, which were allegedly obtained, from an officer's secured password and protected computer file. [Mr. Galbo] also alleges to have a witness who directly observed officers openly talking about the test shortly after it was administered on October 22, 2002. This is not the case." He contends that he never accessed questions and answers from the department computer.

Messrs. Lasiw and Verost maintain that at no time either before or after the subject exam was administered did they observe any test questions in the police department's computer system or mailboxes. Mr. Toepert describes the department's computer access procedures from October 2002 through February 2003, and he indicates that it would be possible for an officer to access another officer's computer files. He states that he never received or saw a computer generated document which listed questions from the subject exam or the Police Captain exam.

The Township of Saddle Brook, represented by Gerald Dorf, Esq., contends that Mr. Galbo's appeal is untimely and should be dismissed under *N.J.A.C. 4A:2-1.1* (Filing of appeals). Specifically, the Township maintains that Mr. Galbo should have known as early as February 20, 2003 or at the latest, April 12, 2003, of Mr. Martinelli's higher score. The Township argues that "[d]espite having such knowledge, [Mr. Galbo] did not file his appeal with DOP until on or after May 11, 2003." The Township also argues that while Mr. Galbo's affidavit indicates that he contacted the DOP, he does not state when he did so. The Township presents that [Mr. Galbo's] argument that the use of identical questions on a make-up exam is *per se* unconstitutional "flies in the face of [*In the Matter of Police Sergeant, supra*] that is both unambiguous and unanimous." The Township contends that examination security was not breached. Specifically, it argues that the questions and answers submitted by Mr. Galbo are hardly "almost all the questions and answers" from the examination. The Township adds that the questions are simply Mr. Laurentino's best recollection of the items and how he may have answered. It argues that Mr. Galbo's allegation of department-wide distribution of the test questions and answers is not supported by credible evidence. The Township argues that typing exam questions and answers into a computer file does not violate *N.J.A.C. 4A:2-10(b)(7)* in that it does not prohibit processed candidates from discussing the examination or writing test questions and answers for their personal use once they leave the test site. The Township contends that this provision is only intended to prohibit conduct that might potentially occur during the administration of the

exam. The Township also indicates that Mr. Martinelli's affidavit states that he was on military leave of absence from September 26, 2001 to December 17, 2002. The Township argues that "[f]or petitioner's allegation to be possible, Martinelli would have had to access Capt. Laurentino's computer file between December 18, 2002 and the date of the make-up examination. However, as Capt. Laurentino's affidavit indicates, Capt. Laurentino deleted the file from the Police Department's computer two weeks after it was created in October 2002." The Township argues that the "bare allegations" submitted by Mr. Galbo do not give rise to a hearing. It adds that if this matter is referred to the Office of Administrative Law for a hearing, "the ensuing proceeding will no doubt have a negative impact on the morale of Saddle Brook police officers . . . [and they] will have to endure for months the unintended consequences and potential internal divisions that these types of appeals often engender."

Mr. Laurentino argues that the questions and answers he typed into the computer were for his own personal use and they were not discussed or circulated throughout the Saddle Brook Police Department headquarters. He indicates that the test questions and answers submitted by Mr. Galbo "are very similar if not identical to the question and answers I created for myself." He contends that he is "certain that if any questions were circulated I would have seen them, or at the very least, heard from someone about it. I never did." He maintains that he does not have personal knowledge of Mr. Tomczyk typing any questions into the computer at police headquarters. He also indicates that while all officers have access to the computer, each officer's files are password protected.

Mr. Tomczyk contends that Mr. Galbo's allegations, which indicate that he typed exam questions and answers into a Saddle Brook Police Department computer and distributed them, are "totally false." He argues that "it is illegal as I am aware of the security pledge I signed" and he "had no interest in helping Mr. James Martinelli pass the exam since we were both in competition for the same Lieutenant's position and it would make no sense in helping someone get a promotion over myself." He asserts that he never saw a copy of the exam questions and answers in or around Police Department headquarters. He explains that while he and Mr. Laurentino were working on the same shift, Mr. Laurentino "was trying to see how he performed on the Captain's promotion exam . . ." and he asked him about the questions that appeared on the exam. He argues that he would have taken immediate action if he had known that Mr. Laurentino "was doing anything with the information in anyway to make it available to Mr. Martinelli, my competitor."

## CONCLUSION

*N.J.A.C. 4A:4-2.10(b)5* prohibits the use or attempted use of unauthorized aids, information or assistance which includes helping or attempting to help another

candidate when taking an examination. *N.J.A.C.* 4A:4-2.10(c) requires disqualification of participants in any prohibited act. Such participants may also be rejected from future examinations and subject to punishment as provided by law. *N.J.A.C.* 4A:4-6.1(a)6 permits the disqualification of an eligible who has made a false statement of any material fact or has attempted any deception or fraud in any part of the selection or appointment processes.

In accordance with *N.J.A.C.* 4A:2-1.1(d), where a material and controlling dispute of fact exists, a hearing is the appropriate forum for resolution. In this regard, the record evidences factual disputes as to whether exam content was disseminated as well as whether Mr. Martinelli had knowledge of test content prior to taking a make-up for the promotional examination for Police Lieutenant (PM2601D), Saddle Brook. Under these circumstances, the matter should be reviewed in the context of a hearing at the Office of Administrative Law.

With respect to the issue of the DOP utilizing the identical examination for make-up candidates, it is noted that prior to 1988, it was Department practice to utilize different tests for police and fire make-up examinations. A statistical methodology of standardizing scores was utilized to equate the scores attained on the make-up examination to the scores on the original examination. This equating was designed to account for differences in difficulty of two separate examinations. However, *In the Matter of Ronald W. Sutton, Police Sergeant (PM1221H) Atlantic City* (Merit System Board, decided July 12, 1988), resulted in the discontinuance of use of different tests for make-up purposes. Based on information provided by both Mr. Sutton's and DOP's experts, it was determined that when two groups are not randomly formed, no equating of scores is possible unless there is an anchor test available to correct for differences between the groups. Since the Department of Personnel develops and administers a different examination for each testing cycle, no such anchor test is available and equating is not possible.

The New Jersey Supreme Court, in *In the Matter of Police Sergeant (PM3776V), City of Paterson*, 176 *N.J.* 49 (2003), found that the use of identical make-up exams was not *per se* unconstitutional. Rather, the Court determined that the existence of direct evidence that virtually all of the questions and answers (65 out of the 71 questions that appeared on the exam) had been disseminated throughout the Paterson Police Department prior to the administration of make-up exams undermined the integrity of the examination process and as such, the make-up exams as administered violated the State Constitution. *Id.* at 64. The Court ordered the Department of Personnel, for future exams, to "administer make-up exams that contain substantially different or entirely different questions from those used in the original examination." *Id.* at 66. As a result, the Department of Personnel established, effective August 19, 2003, a make-up examination pilot program. Under the pilot program, make-up candidates are given a make-up exam when the next regularly scheduled exam for their particular title is administered.

With respect to a comparison of exam scores, if a statistical analysis were performed, it would not be possible to draw the conclusion that cheating occurred since other factors may contribute to make-up candidates' scores, such as additional preparation time which would allow for improved performance. In addition, Mr. Galbo makes the assumption that make-up candidates are randomly distributed throughout the candidate population.

With respect to the timeliness of Mr. Galbo's appeal, *N.J.A.C.* 4A:2-1.1 provides that, unless a different time period is stated, an appeal must be filed within 20 days after either the appellant has notice or should reasonably have known of the decision, situation or action being appealed. In the present matter, Mr. Galbo responded to the certification notice on April 12, 2003, and as such, he was aware by that date that he was no longer ranked first on the subject list. A review of the record indicates that on or about May 2, 2003, Mr. Galbo reported his allegations to Mr. Laurentino and he indicated that he was appealing the matter to the Department of Personnel. As a result, the Deputy Chief of Police, Saddle Brook Police Department, conducted an internal investigation and determined, in part, that it was "neither proven nor believed that [Mr. Martinelli] possessed or had otherwise known about the information that Laurentino generated into the computer." On May 11, 2003, Mr. Galbo filed his appeal with the DOP. Thus, in the strictest terms, Mr. Galbo's appeal was untimely. However, in non-disciplinary appeals, the Merit System Board may relax these time limits. See *Matter of Allen*, 262 *N.J. Super.* 438 (App. Div. 1993). More importantly, the issue of timeliness is immaterial as the Board must address issues regarding examination security regardless of when they are raised.

Regarding the completeness of the questions and answers submitted, the purpose for which they were used is at issue, not the quantity and quality of the questions submitted.

With respect to the Township's argument that typing exam questions and answers into a computer file does not violate *N.J.A.C.* 4A:4-2.10(b)(7), that rule provides that copying, recording or transcribing any examination question or answer, and/or the removal from any examination room of any question sheet, answer sheet, scrap paper, notes or other papers or materials related to the content of an examination shall be considered prohibited actions. In addition, *N.J.A.C.* 4A:4-6.4 (Review of examination items, scoring and administration) provides that candidates shall not be permitted to copy any of the questions and answers, but shall be allowed to make such limited notes as the Department of Personnel permits. See, *e.g.*, *In the Matter of Samuel T. Flamma, Fire Captain (PM4796R), Atlantic City* (Commissioner of Personnel, decided April 16, 1997). Further, all candidates sign pledges that they have not discussed the contents of the examination with any previously processed candidate, that they will not discuss the contents of the examination with any

candidate about to be processed and that they are aware that the possibility of make-up exams exists and pledge not to discuss the content of the examination they are taking with any potential make-up candidate prior to his or her examination. Similarly, make-up candidates signed pledge forms that they have not discussed the contents of the examination with any previously processed candidate. Thus, the practice of requiring candidates to sign pledge forms puts candidates on notice that any discussion of test content with those who have not yet taken the examination, either on the part of those already tested or on the part of those awaiting testing, is prohibited. It is noted, however, that the pledge forms do not specifically prohibit candidates from discussing exam content with candidates for other titles.

With respect to whether this matter warrants a hearing, it is undisputed that Mr. Galbo possesses a copy of an approximation of test questions and answers. However, it is clearly in dispute as to how Mr. Galbo came to possess that copy. As such, a hearing is required since the validity of the make-up examination is dependent upon whether the test questions and answers were distributed and whether Mr. Martinelli had access to them. The DOP must ensure the fairness of the testing process and this can only be accomplished through a hearing.

## **ORDER**

Therefore, it is ordered that the matter of whether copies of test questions and answers were circulated throughout the Saddle Brook Police Department, whether Mr. Tomczyk participated in inputting and distributing test questions and answers, whether Mr. Martinelli had advance knowledge of test content prior to taking a make-up examination, and whether Mr. Tomczyk provided test questions and answers to Mr. Martinelli, is referred to the Office of Administrative Law for a hearing. If violations of the conditions set forth in the pledge forms are established, the Administrative Law Judge should recommend appropriate remedies or sanctions based on *N.J.A.C. 4A:4-2.10(c)* and *N.J.A.C. 4A:4-6.2(a)*. It is also ordered that any appointments from the Police Lieutenant (PM2601D), Saddle Brook eligible list be designated as conditional pending the outcome of this proceeding.